Court, U.S.
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OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM,
CAROLYN HOLDER,
pro se, on behalf of themselves and class of similarly situated persons,

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME III APP. 96-144

Sandra Slaydon Hawes
23 Madeline Court
Helmetta, NJ 08828
(732) 521-0351

Robert A. Muscarella
90 Jamie Court
Monmouth Junction, NJ 08852
(732) 274-2060

Vanita Kadam
Estate of Manohar B. Kadam
14 Stout Court
East Brunswick, NJ 08816
(732) 254-1596

Carolyn Holder
Apt.#952A Village Drive
North Brunswick, NJ 08902
(732) 846-3629

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[1] May it please the Court, by information provided by the Clerk of Court, Petitioners are informed, the RULES of the Supreme Court of the United States, adopted January 11, 1999, effective May 3, 1999, do not prohibit inclusion of a TRANSCRIP which has not been certified.

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Three Gateway Center
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Attorneys for Defendants

FILED
SEP 8 1995
a t 8:30.....M
WILLIAM T. WALSH
CLERK

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA and MANOHAR B. KADAM

Plaintiffs on behalf of themselves and classes of similarly situated persons,

v.

JOHNSON & JOHNSON, et al.,

Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

DOCKET NO.: 94-5332 (NHP)

CIVIL ACTION

AFFIDAVIT OF JOANN HEFFERNAN HEISEN

Joann Heffernan Heisen, of full age and being sworn according to law, upon her oath hereby deposes and says:

1. I am currently a member of the Pension Committee of Johnson & Johnson and was a member of the Pension Committee during the period in which the applications of the three Plaintiffs for benefits under the Severance Plan and Summary Plan Description of Johnson & Johnson and affiliated companies ("Severance Plan") were made and considered. In that capacity I am familiar with the matters recited herein. A copy of the Severance Plan is attached hereto as Exhibit A.

[end of page]

2. Articles 2.1, 4.1, 4.3, 5. 1 (d), 6.3 and 6.4 of the Severance Plan designate the Pension Committee as the administrator of the Severance Plan and confer on the Pension Committee the discretion, inter alia, to construe and interpret the terms of the Severance Plan and to determine benefit eligibility -- including the authority to impose criteria for benefit eligibility in addition to those expressly stated in the Severance Plan and to deny benefits for reasons in addition to those expressly stated in the Severance Plan.

3. Article 6.4(g) of the Severance Plan expressly provides that the Pension Committee may delegate its authority under the Severance Plan, including its discretionary authority to construe and interpret the Severance Plan as well as decide any questions concerning benefit eligibility.

4. Plaintiffs' applications for benefits under the Severance Plan were denied based upon the determination that such benefits were not available to persons who had elected to receive and were receiving the substantial benefits and benefit enhancements provided under the Voluntary Early Retirement Enhancement Program ("VEREP"). This determination was made by members of the Pension Committee with the advice of Johnson & Johnson's Office of General Counsel acting as counsel to the Pension Committee.

5. Plaintiff Robert Muscarella was informed of the decision denying his application for Severance Plan benefits by letter dated March 4, 1994 from Frank Bolden, Esquire, Vice

[end of page]

President Corporate Staff and acting counsel to the Pension Committee. A copy of that letter is attached is Exhibit E to the Affidavit of Robert Rapiejko dated June 29, 1995. Plaintiffs Sandra

Slaydon Hawes and Manohar Kadam were informed of the decision to deny their applications by letter dated April 18, 1994 from Donna M. Malin, Esquire, Office of General Counsel and acting on behalf of the Pension Committee. A copy of the letters are attached as Exhibits D and F to Mr. Rapiejko's Affidavit.

6. The letters denying Plaintiffs' benefit applications were sent on behalf of the Pension Committee pursuant to the delegation of authority to the Office of General Counsel and reflected the determination and decisions of members of the Pension Committee. Further, the letters were sent with the knowledge and approval of members of the Pension Committee. I personally reviewed and approved the letters denying Ms. Hawes' and Mr. Kadam's benefit applications before they were sent. The contents of the letters denying Plaintiffs' applications for benefits was also reviewed by Efrem Dlugacz, another member of the Pension Committee, with primary responsibility for VEREP.

7. The determination not to allow Severance Plan benefits to persons who had elected and received VEREP's enhanced benefits was based upon the provisions of the Severance Plan allowing the Pension Committee to impose eligibility requirements and disqualification's in addition to those set forth in the Severance Plan and to reduce benefits even for eligible employees by the amounts of other benefit such as other severance or similar payments. This construction

[end of page]

and application of the Severance Plan, in turn, was based upon a consideration of the purpose of the Severance Plan. It was determined that the purpose of Severance Plan benefits, to provide interim income to a terminated employee while he/she was in transition, was, to the extent it was applicable to an individual retiring under VEREP, fulfilled by VEREP's enhanced benefits. These included VEREP's Service Benefit, which was calculated on the same basis and at the same level as Severance Plan benefits and

which, at the employee's election, was payable periodically over the same time period as were Severance Plan benefits.

8. The aforesaid determination and the consequent denials of Plaintiffs' applications for Severance Plan benefits, were not based upon the financial interests of either Johnson & Johnson or of Plaintiffs' employer, McNeil-PPC, Inc. (formerly known as Personal Products Company), the company from whose funds any such benefits would have been paid.

Dated: August 31, 1995 By: s/s Joann Heffernan Heisen

Joann Heffernan Heisen

Sworn and subscribed to
Before me this 31st day
Of August, 1995
s/s Caryn Emoch
Notary Pubic

Caryn A. Emoch
A Notary Pubic of New Jersey
My Commission expires Sept. 23, 1996

[end of page]

Carpenter, Bennett & Morrissey (FD7739)
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4082
Telephone: 201-622-7711

Attorneys for Defendants

FILED
MAR 26 1996
a t 8:30.....M
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA
MANOHAR B. KADAM
Plaintiffs,
vs.
JOHNSON & JOHNSON, et al
Defendants.

Civil Action No.: 94-5332 (NHP)

CAROLYN HOLDER
Plaintiff,
vs.
JOHNSON & JOHNSON, et al
Defendants.

Civil Action No. 95-4351

SUPPLEMENTAL AFFIDAVIT OF
JO ANN HEFFERNAN HEISEN

Jo Ann Heffernan Heisen, of full age and being duly sworn according to law, upon her oath hereby deposes and says:

1. I am currently a member of the Pension Committee of Johnson & Johnson and was a member of that committee when the

[end of page 1]

application of Carolyn Holder for benefits under the Severance Plan and Summary Plan Description of Johnson & Johnson and Affiliated Companies ("Severance Plan") was made and considered. In that capacity, I am familiar with the matters recited herein. A copy of the Severance Plan is attached as Exhibit A to my affidavit dated

August 31, 1995. I incorporate the statements that were made in that affidavit.

2. Ms. Holder applied for benefits under the Severance Plan by letter dated March 31, 1994. Her application was denied based upon the same determination on which the applications of Sandra Slaydon Hawes, Robert A. Muscarella, and Manohar B. Kadam were denied.

3. Ms. Holder was informed of the decision denying her application for Severance Plan benefits by letter dated April18, 1994, from Donna M. Malin, Esq., Office of General Counsel, acting on behalf of the Pension Committee. The letter was sent on behalf of the Pension Committee pursuant to the delegation of authority to the Office of General Counsel, reflected the determination and decision of the Pension Committee, and was sent with the knowledge and approval of Pension Committee members. I personally reviewed and approved the letter before it was sent. A copy of that letter is attached as Exhibit A to this affidavit.

s/s Jo Ann Heffernan Heisen

Jo Ann Heffernan Heisen

Sworn and subscribed to
Before me this 9th day
of February, 1996
s/s Caryn Emoch
Notary Pubic

Caryn A. Emoch
A Notary Pubic of New Jersey
My Commission expires Sept. 23, 1996

[end of page 2]

JOHNSON & JOHNSON

OFFICE OF
GENERAL COUNSEL

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N.J. 08933-7002

(908) 524-2465

April 18, 1994

Ms. Carol Holder
952A Village Drive West
North Brunswick, New Jersey 08902

Dear Ms. Holder:

I am writing in response to your letter to the Johnson & Johnson Pension Committee dated March 28th, 1994 and received on March 30th, 1994 requesting benefits under the Johnson & Johnson Severance Plan. This request is denied.

The purpose of the Johnson & Johnson Severance Plan is to "financially assist eligible employees when they are attempting to locate a new employment position." Therefore, when the elimination of your position was announced in October of 1993, you were informed that you were eligible for benefits under the Severance Plan.

In September of 1993 you were informed that you were eligible to participate in the Voluntary Early Retirement Enhancement Program ("VEREP"). Our records indicate that you could not participate in both the Severance Plan and VEREP. My understanding is that you chose to participate in the VEREP.

Under both the Severance Plan and VEREP, the Pension Committee has the sole discretion for determining who is eligible for benefits. Under Section 5-1(d) of the Severance Plan, "the Pension Committee may authorize a reduction in the severance pay to a participant by the amount of any.....similar payment to

which the participant is or shall be entitled by reason of any .....other plan to which the Company directly.... contributes..."

The Personal Products Company ("PPC") policy guidelines cited in your letter are merely a summary of some of the provisions of the Severance Plan. The Severance Plan as well as the PPC guidelines both state that the Severance Plan document governs all differences.

The decision has been made to not permit participation by an employee in both the Severance Plan and VEREP. Therefore, your request for benefits under the Severance Plan have been denied.

Very truly yours,

s/s
Donna M. Malin

DMM/cae

JOHNSON & JOHNSON

OFFICE OF
GENERAL COUNSEL

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N. J. 08933-7002

(908) 524-2465

April 18, 1994

Ms. Sandra Hawes
23 Madeline Court
Helmetta, New Jersey 08828

Dear Ms. Hawes:

I am writing in response to your letter to the Johnson & Johnson pension Committee dated March 28th, 1994 and received on March 30th, 1994 requesting benefits under the Johnson a Johnson Severance Plan. This request is denied.

The purpose of the Johnson & Johnson Severance Plan is to "financially assist eligible employees when they are attempting to locate a new employment position." Therefore, when the elimination of your position was announced in October of 1993, you were informed that you were eligible for benefits under the Severance Plan.

In September of 1993 you were informed that you were eligible to participate in the Voluntary Early Retirement Enhancement Program ("VEREP").You were later informed that you could not participate in both the Severance Plan and VEREP. Our records indicate that you chose to participate in the VEREP.

Under both the Severance Plan and VEREP, the Pension Committee has the sole discretion for determining who is eligible for benefits. under Section 5.1(d) of the Severance Plan, "the Pension Committee may authorize a reduction in the severance pay to a participant by the amount of any ... similar payment to which the participant is or shall be entitled by reason of any ... other plan to which the Company directly ... contributes ..."

The Personal Products Company ("PPC") policy guidelines cited in your letter are merely a summary of some of the provisions of the Severance Plan. The Severance Plan as well as the PPC policy guidelines both state that the Severance Plan document governs all differences.

The decision has been made to not permit participation by an employee in both the Severance Plan and VEREP. Therefore, your request for benefits under the Severance Plan have been denied.

Very truly yours,

DHK/cae

s/s

Donna M. Malin

[end of letter] **JA372**

JOHNSON & JOHNSON

FRANK A. BOLDEN
VICE PRESIDENT
CORPORATE STAFF

NEW BRUNSWICK, N. J.

March 4, 1994

Ms. Carol H. Sapakie
Selikoff & Cohen, P.A.
307 Fellowship Road
Mount Laurel, New Jersey 08054-1233

RE: **ROBERT H. MUSCARELLA SEVERANCE CLAIM**

Dear Ms. Sapakie:

In response to your letter to the Pension Committee of Johnson & Johnson, dated December 2, 1993 and received December 7, 1993, requesting benefits for Mr. Robert A. Muscarella under the Johnson & Johnson Severance Plan, the request is denied.

The purpose of the Johnson & Johnson Severance Plan "is to financially assist eligible employees when they are attempting to locate a new employment position". Therefore, when the elimination of Mr. Muscarella's position was announced in August of 1993, he was Informed that he was eligible for severance benefits under the plan.

In September of 1993, Mr. Muscarella was informed that he was eligible to participate In the Voluntary Early Retirement Enhancement (VEREP). He was later informed that he could not participate in both the Severance Plan and VEREP. He chose to participate In VEREP.

Under both the Severance Plan and VEREP, the Pension Committee has the sole discretion for determining who is eligible for benefits. Under Section 5.1 (d) of the Severance Plan, "the Pension Committee may authorize a reduction in the severance pay to a participant by the amount of any .....similar payment to which the participant is or shall be entitled by reason of any other plan to which the Company directly...contributes... "

The Personal Products Policy Guidelines cited in your letter is merely a summary of some provisions of the Severance Plan. The Severance Plan as well as the Personal Products Policy Guidelines both state that the Plan document governs all differences.

[end of page 1] **JA373**

The decision has been made to not permit participation by an employee in both the Severance Plan and VEREP. Mr. Muscarella's request for benefits under the Severance Plan have therefore been denied.

Sincerely,

s/s

Frank A. Bolden

FAB:jmr
bcc:
S. Bobier
J. Bulvid
D. Dlugacz

[end of letter] **JA374**

JOHNSON & JOHNSON

OFFICE OF
GENERAL COUNSEL

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N. J. 08933-7002

(908) 524-2465

April 19, 1994

Mr. Manohar Kadam
5 Van Arsdale Court
East Brunswick, New Jersey 08816

Dear Mr. Kadam:

I am writing in response to your letter to the Johnson & Johnson pension Committee dated March 28th, 1994 and received on March 30th, 1994 requesting benefits under the Johnson a Johnson Severance Plan. This request is denied.

The purpose of the Johnson & Johnson Severance Plan is to "financially assist eligible employees when they are attempting to locate a new employment position." Therefore, when the elimination

of your position was announced in October of 1993, you were informed that you were eligible for benefits under the Severance Plan.

In September of 1993 you were informed that you were eligible to participate in the Voluntary Early Retirement Enhancement Program ("VEREP").You were later informed that you could not participate in both the Severance Plan and VEREP. Our records indicate that you chose to participate in the VEREP.

Under both the Severance Plan and VEREP, the Pension Committee has the sole discretion for determining who is eligible for benefits. under Section 5.1(d) of the Severance Plan, "the Pension Committee may authorize a reduction in the severance pay to a participant by the amount of any ... similar payment to which the participant is or shall be entitled by reason of any ... other plan to which the Company directly ... contributes ..."

The Personal Products Company ("PPC") policy guidelines cited in your letter are merely a summary of some of the provisions of the Severance Plan. The Severance Plan as well as the PPC policy guidelines both state that the Severance Plan document governs all differences.

The decision has been made to not permit participation by an employee in both the Severance Plan and VEREP. Therefore, your request for benefits under the Severance Plan have been denied.

Very truly yours,

DHK/cae

s/s

Donna M. Malin

JA376

SELIKOFF & COHEN, P.A.
307 Fellowship Road,
Suite 314
Mt. Laurel, New Jersey
08059 (609) 778-6055
CS 0100
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
DOCKET NO. 94-5332(NHP)

Civil Action

AFFIDAVIT OF ROBERT MUSCARELLA

SANDRA SLAYDON HAWES et al.,
Plaintiffs on behalf themselves and classes of similarly situated persons,

V.

JOHNSON & JOHNSON, a New Jersey corporation; et al.,
Defendants.

STATE OF NEW JERSEY)
) ss:
COUNTY OF BURLINGTON)

ROBERT A. MUSCARELLA, being of full age and duly sworn according to law, upon my oath depose and say that:

1. I am a Plaintiff in the above-captioned action and reside at 90 Jamie Court, Town of Monmouth Junction, Middlesex County, New Jersey 08852.

2. I was born on July 21, 1942.

3. 1 was hired as an engineer by a subsidiary of Johnson & Johnson commencing on April 24, 1967, and remained employed by Johnson & Johnson subsidiaries until November 30, 1993.

4. I was last employed as an engineer by McNeil- PPC, a Johnson & Johnson subsidiary also known as Personal Products Company ("PPC"), in Milltown, New Jersey. My position in PPC's Engineering Department was eliminated on October 29, 1993 when

the department was shut down, and I was assigned to out-placement for the month of November.

5. My active employment with Johnson & Johnson or its subsidiaries terminated on November 30, 1993, at which time I was 51 years of age.

6. On the morning of August 20, 1993, I attended a general meeting of PPC Engineering Department personnel. PPC Vice President Edward Perkins informed the meeting that the Engineering Department would be eliminated and shut down by the end of October. He indicated that those employees who were not transferred to Johnson & Johnson Worldwide Absorbent Products & Materials Research ("J&J WAPMR"), a related engineering division at the same Milltown plant, would be severed, and that approximately half of those in attendance would not be transferred. A severance benefit schedule in the form attached hereto as Exhibit A was shown on an overhead projector to all who attended the meeting.

7. That same afternoon, I was called to a private meeting with PPC Human Resources Director Robert J. Rapiejko and Director of Engineering Robert A. Jenkins. I was informed by Mr. Jenkins that there was no position for me at J&J WAPMR.

8. Mr. Rapiejko gave me a copy of the severance guidelines which had been shown on the overhead projector that morning.

9. I later received personalized separation package, attached hereto as Exhibit B, based upon the guidelines given to me on August 20, 1993. It included severance of $101,699.91 at my biweekly rate of $2,607.69 for 78 weeks starting on October 30, 1993, and continuing until April 28, 1995, or until I became reemployed by Johnson & Johnson or one of its affiliated companies.

10. On September 1, 1993, PPC announced that it was making Johnson & Johnson's Voluntary Early Retirement Enhancement Program ("VEREP") available to salaried personnel employed

on September 16, 1993. A PPC employee retiring under the VEREP program had to retire by the end of November 1993, unless requested to stay on until a later date.

11. VEREP increased the retirement benefit immediately available to employees who were 50 years of age or older and had at least seven years of service by adding five years to their age and three years to their service credit in computing a pension under Johnson and Johnson's normal retirement benefit formula.

12. VEREP was not restricted to employees being terminated, or presented to me as an alternative to severance. Because I met the age and service requirements for the VEREP program, had not been offered a transfer to another Johnson & Johnson company and could not save my job by refusing the offer of enhanced benefits, I executed the documents required to accept VEREP on September 22, 1993.

13. Because my position was scheduled for elimination when PPC's Engineering Department was shut down at the end of October, and because I was being involuntarily terminated, I inquired about my severance eligibility.

14. On October 21, 1993 I was provided a copy of the Johnson & Johnson Severance Plan attached hereto as Exhibit C and found that it included among those eligible for severance any regular full-time salaried employee "whose employment is terminated as a result of an event listed in Article 4.1(a) and who elects to retire under a retirement plan of the Company . . ..." The listed events included position elimination or a reduction in force.

15. On October 22, 1993, I discussed severance with PPC Human Resources Director Robert Rapiejko. Three days later he sent me the memo attached hereto as Exhibit D telling me that I would not be eligible for the separation package outlined on August 20, 1993 if I took VEREP. Mr. Rapiejko did not mention severance under the Johnson & Johnson Severance Plan.

16. On December 2, 1993, an attorney on my behalf submitted an application for severance benefits to the Johnson & Johnson Severance Plan administrator.

17. In March 1994, I received correspondence dated March 4, 1994, from Johnson & Johnson's Vice President and General Counsel Frank Bolden, rejecting my application for severance because "the decision has been made not to permit participation by an employee in both the Severance Plan and VEREP".

18. My attorney thereafter appealed the denial of my application to the Johnson & Johnson Severance Plan administrator, but received no response.

s/s

ROBERT A. MUSCARELLA

SWORN and SUBSCRIBED to
before me this 28th day
of June, 1995

s/s Joan E. Peculski

NOTARY PUBLIC

JOAN E PECULSKI
Notary Public of New Jersey
My Commission Expires 10/20/97
ID # 54888

[end of page 5]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUT
NO. 98-6408

SANDRA SLAYDON, HAWES,	:	
ROBERT A. MUSCARELLA and	:	TRANSCRIPT OF
MANOHAR B. KADAM,	:	AUDIO TAPE
CAROLYN HOLDER	:	FROM PROCEEDING
Plaintiffs/Appellants	:	
on behalf of themselves	:	
and classes of similarly	:	
situated persons,	:	
	:	
-vs-	:	
	:	
JOHNSON & JOHNSON, et al.,	:	
	:	
Defendants/Appellees.	:	

BEFORE:

BECKER, CHIEF JUDGE
GARTH, CIRCUIT JUDGE AND
POLLAK, DISTRICT JUDGE *

Wednesday, September 22, 1999

* The Honorable Louis H. Pollak, United States District Judge of Pennsylvania, Sitting by Designation.

Appearances:

SELIKOFF & COHEN, ESQS.,
BY: CAROL H. ALLING, ESQ.,
For the Plaintiffs/Appellants.

CARPENTER, BENNETT & MORRISSEY, ESQS.,
BY: FRANCIS X. DEE, ESQ.
For the Defendants/Appellees.

THE COURT: You may proceed.

MS. ALLING: If it would please the court, I am Carol Alling of the law firm Selikoff & Cohen, representing the appellants in this case, Robert Muscarella, Sandra Slaydon Hawes, Carolyn Holder, and the estate of Manohar Kadam. If it would please the court, I would like to reserve three minutes of rebuttal time . . .

THE COURT: Certainly may.

MS. ALLING: . . . at the end of my presentation. There has been extensive briefing in this matter and I'm now going to make presentation to the court now – discuss the matter of whether a de novo or arbitrary and capricious standard applies to the review of the Plan Administrator, or its determination in this case, that the plaintiffs were not entitled to severance because they had chosen to receive enhanced early retirement benefits, rather than a deferred pension benefit at the time of their terminations from employment. I'm not going to discuss the de novo of standard because even under an arbitrary and capricious standard, the Plan Administrator's decision must be set aside if it violated the prohibition upon age discrimination set forth in the Age Discrimination & Employment Act, or New Jersey's law against discrimination; and in particular, those provisions of the federal law, which were added by the Older Workers Benefit Protection Act of 1990. Those amendments specifically were intended by Congress to protect older workers in their benefits.

Defendants argue in this case that their policy of disqualifying those who received enhanced early retirement benefits from severance or separation pay did not treat age protected employees less favorably than non-protected employees because the value of the VEREP pension benefits to which older employees were restricted, exceeded, or equaled the combination of severance and deferred retirement benefits available to younger employees.

Defendants also assert there was no adverse treatment of the pension eligible employees because no employee received more than one type of benefit, denying adverse treatment based on any combination of severance and pensions benefits. Disregard for

the most basic facts in this case which is that plaintiffs were fully qualified for both severance or separation pay -- whichever was higher, and an immediate pension benefit under the VEREP program, while younger employees simply were not. Moreover, the plaintiffs were entitled to each of these benefits for wholly independent and separate reasons. They qualified for severance because their positions had been eliminated, their termination date was set, their department was closed, and they had no jobs. They were qualified for early retirement/ancillary retirement benefits because they were employed on the required date September 16, 1993, they were 50 years of age or older, and had at least seven years service history with the Johnson & Johnson Family of Companies. Termination was not a requirement for VEREP eligibility, and neither was severance eligibility a disqualification from VEREP. On the other side of the fence, with regard to the severance plan, the severance plan specifically provided – explicitly provided that retirement pursuant to a company retirement plan would not disqualify an employee from the severance to which they were otherwise entitled. There was no coordination of benefit provision between the two programs, and no reason, if one found that the plan's documents warranted, they could not qualify for both. But the grounds on which these individuals were disqualified by the plan's administrator is what particularly violated the restrictions of the – of ADEA and the New Jersey Law against discrimination on the basis of age. The plaintiffs were denied severance because they accepted retirement benefits for which they were qualified, at least in part, on the basis of their age. Where different circumstances qualified a single older employee for both severance and pension benefits under different plans, the Third Circuit found in Westinghouse I and Westinghouse II that the combination of severance and pension benefits could no be relied upon to allow an employer to disqualify from severance otherwise qualify older employees simply because they accepted retirement benefits.

THE COURT: Could I – could I interrupt you for just a moment?

MS. ALLING: Sure.

THE COURT: The service aspect of VEREP – what is it

APP.117 PAGE PURPOSELY ABSENT

APP.118 PAGE PURPOSELY ABSENT

might have permitted an offset for the value of the service benefit. However, the conditions established by that section were not satisfied in this case, and Johnson & Johnson really has never argued that they were, because the plaintiffs did not receive an immediate and unreduced pension because even with the VEREP enhancements, they were treated as early retirees – their normal pension benefit was reduced by three percent per year for each year they retired before they were age 60 and even the five years added to their age. They were facing a pension reduction for – the largest number of years was five years.

THE COURT: So the VEREP was not a better deal? If it wasn't, why did they take it?

MS. ALLING: It was a – the question, is a better deal than what? Was it a better deal than the . . .

THE COURT: Instead of waiting for their normal retirement and getting both severance and normal retirement, which they could have done just like the younger workers.

MS. ALLING: They had earned the right to the VEREP benefit.

THE COURT: But they didn't have to take it.

MS. ALLING: They didn't have to take it but they didn't have to give it up either. There was nothing in Severance Plan which required them to give up what they had earned – what they were entitled to under all qualifications for VEREP. There was nothing in the Severance Plan which required them to give that up in order to receive the severance benefit and with OWBPA (the Older Worker's Benefit Protection Act) definitions of permissible offsets did not permit the offset of the service benefit because these were not actuarially a reduced pension. In fact, the affidavit John Baldwin -- in the record here and I'll give you the cite to it in a moment – who was the Johnson & Johnson Director of Benefit Programs, he set up a chart that showed that unless you were age 57 you did not receive an actuarially on the reduced pension benefit on the VEREP, in terms of Mr. Baldwin's affidavit -- and the chart that is set forth here, as well as another item in the record – a chart that was circulated to all the people that had to choose whether to take severance or VEREP.

THE COURT: Before your time is up, I want you to answer

Mr. Dee's I thought, rather forceful argument, that these folks are better off, not only not worse off, than the other employees, but better off than the other employees. In which case you don't have any adverse impact and don't make out your prima facie case under McDonald Douglas.

MS. ALLING: The plaintiffs in this case were worse off – the adverse impact they faced should not be assessed in terms of the money, but it is a question of whether they were the only employees selected on the basis of their age and to choose between severance benefits and pension benefits.

THE COURT: You mean there are some – you mean we measure these cases not in terms of monetary benefits whether they be direct or fringed, but in terms of some personal status slight, -- in terms of some abstract or . . .

MS. ALLING: I misspoke. I should not have said the evaluation is not in terms of money. But under the Age Discrimination & Employment Act, 29 623(f) (2) (B) (i) – The Equal Cost/Equal Benefit Rule enacted by Congress for evaluating whether employees benefits are worth more or less than younger workers, in terms of money. That rule, enacted by Congress to reverse the effect of the Betts, and codified this court's decision in Westinghouse II, says you must look at each benefit separately, and you may not combine a pension benefit with a severance benefit – add the two together and say -- and determine whether the benefit is worth more or less in money. You must examine each benefit separately.

THE COURT: What do you do – but, but, it seems to me that you're looking at only part of the picture. You're ignoring the discretionary authority of the Plan Administrator under cases like Jamaica – I mean, it starts with 'My opinion, from Hosier,' and goes down the whole line, the whole line of cases. Where there – Hamilton versus Air Jamaica – you're ignoring the discretion of the Plan Administrator's a) to withdraw welfare benefits – which is what we are talking about here, or at least b) also confirmed by the terms of this – explicate terms of the plan to -- to act the way they did because of the similarity between the service benefit component of VEREP and the severance. You seem to be ignoring those aspects of the equation.

MS. ALLING: In part, that is because if the Plan

Administrator exercises even a very broad discretion, in a way that violates the prohibitions of age discrimination's statutory prohibitions upon age discrimination in determination, is by definition arbitrary and capricious. The other matter to consider in that regard is – a true – an employer may withdraw welfare benefits through a valid plan amendment, but as the Hosier decision recognized, the plan may not be orally amended, the plan may not be amended through informal memos – amendment of a plan to terminate these benefits certainly across the board requires the formal action to amend the plan. The real point here though is that if the – if Plan Administrator's decision violated the prohibitions on age discrimination is by definition arbitrary and capricious and exceeds whatever discretion the Plan Administrator might have.

THE COURT: Ms. Alling, you refer to the statute you aphonously referred to as 'OPA'?

MS. ALLING: O WBPA.

THE COURT: As designed and codified Westinghouse II, I'm not quite clear what the basis on that is. I understand that the Senate and House reports referred to Westinghouse I as something that needed to be resurrected and re-affirmed – am I missing something with Westinghouse II, covered in there too?

MS. ALLING: The -- I'm not suggesting that the Congress itself referred to Westinghouse II, but Westinghouse II, rejected the argument that greater actuarial value cured any age discrimination in disqualifying from severance those who chose to receive an age dependent early retirement benefit and in reaching that conclusion, the court noted that giving the people the option, between an immediate retirement and a deferred retirement if they wanted severance, did not eradicate the discriminatory effect either because, "severance pay is a fringe benefit for which vested or early or selected retirement benefits cannot be a substitute." In incorporating in Section (f) (2) (B) (i) of the Age Discrimination & Employment Act, the equaled cost benefit rule -- Congress required that those benefits be analyzed benefit by benefit just as the court in Westinghouse II required that the benefits be examined to see whether older workers were getting less than younger workers – that that examination being benefit by benefit where the benefits arose from independent

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gentleman and I would be willing to stipulate . . . I think we would be willing to stipulate that word for his word.

THE COURT: Okay. Thank you. Mr. Dee . . .

MR. DEE: May it please the court, my name is Mr. Francis X. Dee of Carpenter, Bennett & Morrissey, and I represent appellees Johnson & Johnson defendants. This is a classic case that gives proof to the adage, no good deed goes unpunished. If we step back and look at what happened here, the PPC (Personal Products Company), the Engineering Department was going to – going through a reorganization and obviously people were going to lose their jobs – and people were entitled to severance pay. Counsel refers to the Milltown Severance Pay – I'm not sure exactly what she's talking about. The only allegations in this complaint as to any violation of the severance plan are to the Johnson & Johnson Severance Plan, so there is a reference attached to Mr. Muscarella's affidavit to one page of some management guideline, and that's never been an issue in this case – the whole issue has been with respect to the Johnson & Johnson Plan that was to have some human resources department name referred to it or to a different plan. As a matter of fact, in dealing with the classification issue, Counsel specifically said, that they were not seeking benefits under the PPC Plan and that's in Joint Appendix JA292, so I don't know where that no found plan took into flight here. We've always talking about the Johnson & Johnson Severance Plan, which is attached to the exhibit of complaint. So what happened here was that these people were eligible for severance if in fact they were terminated as was originally intended, but the problem came about because the corporation had instituted the VEREP Plan, which was a voluntary plan designed to have people leave the corporation voluntarily throughout the entire Johnson & Johnson Family of Companies. But each individual company could make a decision as to whether to opt into the VEREP Plan, which for some companies, didn't want to have people leave – they were sufficiently staffed and they needed people – other companies did.

THE COURT: When you say 'companies,' you referring to other departments or divisions . . .

MR. DEE: The Severance Plan – the VEREP Plan was

available throughout the entire Johnson & Johnson Family of Companies, which included various separate corporations – various business units and each business unit had a different type of problem. Some business units needed people, other business units were fine in terms of their levels of employment, and others were over-staffed, and so each company, a business unit had a right to decide whether they opt into the VEREP plan and make that available to their employees . . .

THE COURT: Is that regardless of whether or not they were eliminating positions.

MR. DEE: Yes. Yes. Now what happened here, the whole design really was not to apply the VEREP plan if they were eliminating positions. The idea of the VEREP Plan was to make the plan available voluntarily, so that they wouldn't have to terminate people – and then that was the whole approach. Rather than terminate people and create ill-will and so and so forth, they wanted people to leave voluntarily with a generous package. Now what happened here, is before the VEREP Plan became – came into effect or became public, the Personal Private Company was reorganizing its engineering department and people were notified about that. So when VEREP was announced, then the question became well, is it fair not to allow these people to also participate in the VEREP, because but for the timing, if the VEREP had come out before, perhaps they would have been made eligible for the VEREP and we wouldn't have the issue of involuntary terminating anybody. So the Company, which is why I say no good deed goes unpunished, they could have just sat back and said, 'hey, you're out of luck – we're not going to offer the VEREP to you.' So instead, they did what I think was appropriate, and they offered the VEREP to these individuals. But they said, you can't get both. Okay. Now . . .

THE COURT: Where did they say that—that you can't get both – because I saw that in your brief, but I couldn't find any citation to any document or writing that said you can't get VEREP and you can't – if you take VEREP, you can't get severance and you can't get medical insurance benefits and pension, whatever.

MR. DEE: Well, since this came up on summary

judgement, there were some factual disputes below that we did not get into there because obviously on summary judgement we had similar facts that were most favorable to plaintiffs. So, there were – the factual disputes were that there were some seminars and so and so forth, where these questions were answered. But there is one fact not in dispute – and that is Joint Appendix page 189, which is a letter from Mr. Bob Ropiko to Mr. Muscarella, dated October 25, 1993, where he says, and I quote, "As requested, this confirms our conversation regarding VEREP. If you take VEREP, you are not eligible for the separation package as outlined in the meeting of August 20, 1993. It is your choice, you are eligible for the separation package or VEREP, not both." And that is not in dispute obviously, Mr. Muscarella received that. Now he had until October 30 after receiving this letter, if he wanted to change his mind and decide he was going to take the severance. Now, just so – there is some confusion in the record, and just so we're clear on that – there was the PPC severance package, which counsel refers to as providing for a greater level of benefits – but that was an enhanced severance package in return for signing a release, and that's never been an issue in the case because none of the plaintiffs here chose. . .

THE COURT: Signed a . . .

MR. DEE: Yeah. Now, as I look at this case, what we have – is we have the two issues, the _____ clause and the classification issue. We have the issue under ERISA, as to whether or not the plan administrator's determination that these individuals could not get both severance and the VEREP, whether that is arbitrary and capricious. I was mindful of the argument this morning regarding the insurance company, concerning that the applicability of that standard, but there is no conflict here and no issue with respect to that area – it has never been raised. The plaintiffs and we have always assumed the arbitrary and capricious standard applied.

Now there are three provisions in the severance plan that are applicable. The first one is the section that deals with . . . Section 4 of pages 12 through 14 of our brief. The first provision deals with the initial eligibility and also the disqualification for severance under the severance plan and in that regard, the triggering events is termination. Now here, there is no question

that the plaintiffs – these plaintiffs would have been terminated had they not taken the VEREP, but that's not the issue in terms of the eligibility question. The question here is, what was it that ultimately happened to them, because what really happened is that if the VEREP had not been made available to them, yes, they would have been terminated. But since VEREP was made available to them as an option, their termination occurred not by virtue of involuntary termination, which would trigger severance, but rather, voluntary termination, which triggers the VEREP. The two triggering events are mutually exclusive. They cannot have an involuntary termination under severance and still be eligible for VEREP, nor can they have a voluntary termination under VEREP and be eligible for severance. They are mutually exclusive.

THE COURT: Did anybody other than Mr. Muscarelli get the letter that is shown on – that you just read to us from Joint Appendix on page 189?

MR. DEE: The record does not reflect that -- and that gets back to the issue – there were all sorts of seminars where people were told this. There are some disputes in the record. Of course, we did not get into that because we could not resolve disputes on summary judgements. You have then, which is quoted on the top of page 13 of our brief, another disqualifying event, and that is 'Such other reasons as the pension committee shall in its sole discretion, determine to cause the denying of benefits under the plan" – and that is directly applicable here because what really happened, is that since we made the VEREP plan available to this group, the Company obviously did so, knowing that it had this provision in the severance plan to be able to say, 'Hey look, we're making VEREP available to you, but you can't get severance – you can't double-dip.' Okay, and I like to think of it as – you know, if I said to my two daughters, you can get a bologna sandwich you know with bread and bologna and all that and I said to my two sons, you got a choice, you can have the bologna sandwich, but you know, since you guys eat more and you've been around longer, so on and so forth, we're going to give you a steak sandwich. You got a choice. You can't take both. You can get the same bologna sandwich your daughter – your sister's have, but if you don't want that, you get more – you

can get the steak sandwich. So they obviously are not being treated adversely. They had a choice. That gets to the age issue. But with respect to the disqualification . . .—

THE COURT: But your friend says they are being treated adversely. You heard her.

MR. DEE: Yes.

THE COURT: Because there was a difference between the service and the severance in terms, and I think in one of the briefs it shows -- it shows a percentile. Apparently one of them gets four percent less, and the other one gets some other percentage less, but she said because the caps are different.

MR. DEE: Well.

THE COURT: Now, I don't know whether that is so or not, but you can explain that.

MR. DEE: The caps are different between the severance plan and the VEREP plan with respect to the service benefit, but the caps do not effect any of the plaintiffs.

THE COURT: What about the fact that – there is a different – I think she mentioned that somebody who worked for two years would get one sum, whereas somebody who worked for, lets say 15 years would get another sum that would be higher under the severance benefit.

MR. DEE: I'm not sure what she's talking about there.

THE COURT: Okay. Well, I wasn't either.

MR. DEE: There's a one page – there's a one page excerpt in the record attached to Mr. Muscarella's affidavit that is really not a plan. It is a one page except and it doesn't – it's not clear to me whether that is what counsel is referring to or whether she's referring to the enhanced severance with respect to the release that was offered. The enhanced severance was a greater severance than either the severance plan benefit or the VEREP service benefit.

THE COURT: Well, maybe she can clear it up when she gets up.

MR. DEE: But, but the big issue there – that has never been an issue in this case, until -- until now. Although, the only question was for severance pay plan which was attached to the complaint – and now counsel is bringing in – attempting to bring in another plan, and the only thing we have in the record with

respect to that is if I'm understanding her correctly, is this one page excerpt that was never an issue, and it isn't an entire document. So you have in terms of eligibility for the severance plan – you have the fact that they did not terminate involuntarily because the very fact that they chose VEREP meant that it was a voluntary termination and therefore, they were not eligible for the severance plan – and I might add, there is a provision that talks about an exception to the disqualifying event that says, "Retirement, except in its apparent _____", as quoted on the bottom of page 12 of our brief. That, quite frankly, is designed to deal with the problem – perhaps you want to refer to it as a Westinghouse problem, where somebody is entitled to a retirement benefit -- if they then choose – and they get terminated involuntarily, and they choose to retire because they are eligible for retirement, this says, and we put it in there ourselves, you're not deprived of the severance benefit – you get both, the severance and a retirement – and that is what that refers to. Here, is what we have is a situation where the Company, because there was not involuntary termination that ultimately led them out the door, it was a voluntary termination via the VEREP. They were not qualified for the severance because of this Subsection 8, which is quoted on the top of page 13 of our brief, the pension committee had the right to say this severance benefit is not going to be paid to anybody who got VEREP, and thirdly, on the middle of page 13 of our brief, we have another provision that gives the pension committee very broad discretion and quite frankly says, "and may impose such other eligibility conditions on payment of benefits as may be deemed advisable;" and that's we get into the Linker versus Bethlehem Steele case and the Hamilton versus Air Jamaica case. Those cases say quite clearly, that even in situations where the company is making a case by case analysis, take in the situation and applying the terms of the plan – that that's okay, it's not illusionally and so on and so forth. And that really stems from the fact that there is a difference between pension benefits where the statute – ARISA actually regulates the substance of content. With a pension plan, as opposed to welfare benefits, which a severance plan is, where ARISA does not regulate the substance of the content. But the Company has to follow the terms of the

plan. Counsel has made a reference that in fact, we needed something in writing for a written amendment to the plan, but then misses the boat, because we weren't amending the plan in making this determination. We were taking the existing plan and interpreting these three provisions – so it is not an amendment to the plan and it shouldn't be treated as such. Now, with respect to the – my position quite clearly is that we have, with particularly the arbitrary and capricious standard, we had the right to deny the severance under ARISA and under the plan. Now, our next question becomes was it in violation of the age act? Well, first of all, there was no adverse treatment and that really isn't the big key. Counsel gets into the safe harbor, provisions - - 623(f) (2) and *I*2, and so and so forth . . . those are safe harbor positions – provisions. They are not – they don't define what is unlawful. Now, I recognize that in the case, the U.S. Supreme Court addressing issue kind of reversed it – this court in Westinghouse, had analyzed it the way I think it ought to be analyzed, namely that you look to see if there is a violation of the statute to begin with, and then you look at these safe harbor provisions or affirmative . . .

THE COURT: Tell us in practical terms, Mr. Dee why these people are better off and not worse off.

MR. DEE: Okay. Two reasons. First of all they had a choice. They could take their severance benefit and they could take the retirement that they were entitled to. That was the same as the younger people had. So they got the exact – one of their choices, was exactly the same that they were entitled to, and exactly the same as the younger people had. They had an additional option, and that is that they could take the VEREP benefit, and the VEREP benefit was a very good benefit and that's why you're not going to see anybody refuse it. The VEREP benefit permitted . . .

THE COURT: You know about godfather offers in North Jersey, is that the idea, Mr. Dee?

MR. DEE: I'm not sure who he is. . . No, we didn't do that. We didn't do that.

THE COURT: Mr. Dee, maybe you can explain why – why the option here is a legitimate one, as distinct from the option which this court said in Westinghouse II was not a

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 81 - SUPREME COURT
28 USC Sec. 1254
Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

TITLE 29 - LABOR
CHAPTER 14 - AGE DISCRIMINATION IN EMPLOYMENT
29 USC Sec. 621
Sec. 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that -

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub. L. 90-202, Sec. 2, Dec. 15, 1967, 81 Stat. 602.)

Short tittle of 1990 Amendment. Pub. L. 101-433, Sec. 1, Oct. 16, 1990, 104 Stat. 978, provided that: "This Act (amending sections 623, 626, and 630 of this title and enacting provisions set out as notes under this section and sections 623 and 626 of this title) may be cited as the 'Older Workers Benefit Protection Act'."

Congressional Statement of Findings. Pub. L. 101-433, title I, Sec. 101, Oct. 16, 1990, 104 Stat. 978, provided that: "The Congress finds that, as a result of the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29U.S.C. 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations."

TITLE 29 - LABOR
29 USC Sec. 623
Sec. 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization -

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section -

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan-

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection -

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(k) Date of adoption of system or plan

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

***(l)* Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits**

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age -

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii):

are deducted from severance pay made available as a result of the contingent event unrelated to age.

Effective Date of 1990 Amendment. Section 105 of title I of Pub. L. 101-433, as amended by Pub. L. 102-236, Sec. 9, Dec. 12, 1991, 105 Stat. 1816, provided that:

(a) In General. - Except as otherwise provided in this section, this title (amending this section and section 630 of this title and enacting provisions set out as notes under this section and section 621 of this title) and the amendments made by this title shall apply only to -

(1) any employee benefit established or modified on or after the date of enactment of this Act (Oct. 16, 1990); and

(2) other conduct occurring more than 180 days after the date of enactment of this Act.

TITLE 29 - LABOR
29 USC Sec. 626
Sec. 626. Record keeping, investigation, and enforcement

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

TITLE 29 - LABOR
29 USC Sec. 630
Sec. 630. Definitions

For the purposes of this chapter -

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30,1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(*l*) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide plan.

TITLE 29 - LABOR
29 USC Sec. 631
Sec. 631. Age limits

a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

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29 USC Sec. 1001
CHAPTER 18 - EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I - PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle A - General Provisions

Sec. 1001. Congressional finding and declarations of policy.

Sec. 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension plan.

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
PART 1625--AGE DISCRIMINATION IN EMPLOYMENT ACT
Subpart A--Interpretations

Sec. 1625.10 Costs and benefits under employee benefit plans.

(a)(1) General. Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such * * * employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individuals.
The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed. The following sections explain three key elements of the exception:

(i) What a "bona fide employee benefit plan" is;
(ii) What it means to "observe the terms" of such a plan; and
(iii) What kind of plan, or plan provision, would be considered "a subterfuge to evade the purposes of [the] Act."

There is also a discussion of the application of the general rules governing all plans with respect to specific kinds of employee benefit plans.

(a)(2) Relation of section 4(f)(2) to sections 4(a), 4(b) and 4(c). Sections 4(a), 4(b) and 4(c) prohibit specified acts of discrimination on the basis of age. Section 4(a) in particular makes it unlawful for an employer to `"discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * *." Section 4(f)(2) is an exception to this general prohibition. Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a), and accordingly the practice does not have to be justified under section 4(f)(2).

(b) Bona fide employee benefit plan. Section 4(f)(2) applies only to bona fide employee benefit plans. A plan is considered `"bona fide" if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan. Notifying employees promptly of the provisions and changes in an employee benefit plan is essential if they are to know how the plan affects them. For these purposes, it would be sufficient under the ADEA for employers to follow the disclosure requirements of ERISA and the regulations thereunder. The plan must actually provide the benefits its provisions describe, since otherwise the notification of the provisions to employees is misleading and inaccurate. An "employee benefit plan" is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as "fringe benefits." The term does not refer to wages or salary in cash; neither section 4(f)(2) nor any other section of the Act excuses the payment of lower wages or salary to older employees on account of age. Whether or not any particular employee benefit plan may lawfully provide lower benefits to older employees on account of age depends on whether all of the elements of the exception have been met. An "employee-pay-all" employee benefit plan is one of the "terms, conditions, or privileges of employment" with respect to which discrimination on the basis of age is forbidden under section 4(a)(1). In such a plan, benefits for older workers may be reduced only to the

extent and according to the same principles as apply to other plans under section 4(f)(2).

(c) "To observe the terms" of a plan. In order for a bona fide employee benefit plan which provides lower benefits to older employees on account of age to be within the section 4(f)(2) exception, the lower benefits must be provided in "observ[ance of] the terms of" the plan. As this statutory text makes clear, the section 4(f)(2) exception is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee benefit plan. Where the employer, employment agency, or labor organization is not required by the express provisions of the plan to provide lesser benefits to older workers, section 4(f)(2) does not apply. Important purposes are served by this requirement. Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

(d) Subterfuge. In order for a bona fide employee benefit plan which prescribes lower benefits for older employees on account of age to be within the section 4(f)(2) exception, it must not be "a subterfuge to evade the purposes of [the] Act." In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a "subterfuge" within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations. (The only exception to this general rule is with respect to certain retirement plans. See paragraph (f)(4) of this section.) There are certain other requirements that must be met in order for a plan not to be a subterfuge. These requirements are set forth below.

(d)(1) Cost data--general. Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years. An employer may rely in cost data for

its own employees over such a period, or on cost data for a larger group of similarly situated employees. Sometimes, as a result of experience rating or other causes, an employer incurs costs that differ significantly from costs for a group of similarly situated employees. Such an employer may not rely on cost data for the similarly situated employees where such reliance would result in significantly lower benefits for its own older employees. Where reliable cost information is not availlable, reasonable projections made from existing cost data meeting the standards set forth above will be considered acceptable.

(d)(2) Cost data--Individual benefit basis and "benefit package" basis. Cost comparisons and adjustments under section 4(f)(2) must be made on a benefit-by-benefit basis or on a "benefit package" basis, as described below.

(i) Benefit-by-benefit basis. Adjustments made on a benefit-by-benefit basis must be made in the amount or level of a specific form of benefit for a specific event or contingency. For example, higher group term life insurance costs for older workers would justify a corresponding reduction in the amount of group term life insurance coverage for older workers, on the basis of age. However, a benefit-by-benefit approach would not justify the substitution of one form of benefit for another, even though both forms of benefit are designed for the same contingency, such as death. See paragraph (f)(1) of this section.

(ii) "Benefit package" basis. As an alternative to the benefit-by-benefit basis, cost comparisons and adjustments under section 4(f)(2) may be made on a limited "benefit package" basis. Under this approach, subject to the limitations described below, cost comparisons and adjustments can be made with respect to section 4(f)(2) plans in the aggregate. This alternative basis provides greater flexibility than a benefit-by-benefit basis in order to carry out the declared statutory purpose "to help employers and workers find ways of meeting problems arising from the impact of age on employment." A "benefit package" approach is an alternative approach consistent with this purpose and with the general purpose of section 4(f)(2) only if it is not used to reduce the cost to the employer or the favorability to the employees of overall employee benefits for older employees. A "benefit package" approach used for either of these purposes would be a subterfuge to evade the purposes of the Act. In order to assure that with such a "benefit package" paragraph approach is not abused and is consistent the legislative intent, it is

subject to the limitations described in (f), which also includes a general example.

(d)(7) Involuntary retirement clauses. Any provision of an employee benefit plan which requires or permits the involuntary retirement of any individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purpose of the Act and cannot be excused under section 4(f)(2).

(f)(2) "Benefit package" approach. A "benefit package" approach to compliance under section 4(f)(2) offers greater flexibility than a benefit-by-benefit approach by permitting deviations from a benefit-by-benefit approach so long as the overall result is no lesser cost to the employer and no less favorable benefits for employees. As previously noted, in order to assure that such an approach is used for the benefit of older workers and not to their detriment, and is otherwise consistent with the legislative intent, it is subject to limitations as set forth below:

(f) (2) (ii) A benefit package approach shall not apply to a retirement or pension plan. The 1978 legislative history sets forth specific and comprehensive rules governing such plans, which have been adopted above. These rules are not tied to actuarially significant cost considerations but are intended to deal with the special funding arrangements of retirement or pension plans. Variations from these special rules are therefore not justified by variations from the cost-based benefit-by-benefit approach in other benefit plans, nor may variations from the special rules governing pension and retirement plans justify variations from the benefit-by-benefit approach in other benefit plans.

(f) (2) (iv) A benefit reduction greater than would be justified under a benefit-by-benefit approach must be offset by another benefit available to the same employees. No employees may be deprived because of age of one benefit without an offsetting benefit being made available to them.

[44 FR 30658, May 25, 1979, as amended at 52 FR 8448, Mar. 18, 1987. Redesignated and amended at 52 FR 23812, June 25, 1987; 53 FR 5973, Feb. 29, 1988]

CITATIONS FROM DEFENDANTS' REPLY BRIEF ON APPEAL

FROM PAGE 14:

Eligible PPC engineering department employees also were offered the opportunity to participate in a **special separation pay program applicable to the department closing.** That program provided **greater separation pay** than was provided under the Severance Plan, in exchange for a release of all claims. (Ja331,368-71). **None of the plaintiffs elected to participate in that program.** (Id.) (emphasis added)

FROM PAGE 18:

Plaintiffs' ADEA claims fail as a matter of law because, as the district court recognized, plaintiffs were not treated adversely to younger employees. Plaintiffs could have elected to receive exactly what younger employees received: Severance Plan benefits and, at any eligible retirement age their full vested pension benefits without any offset between the two. Instead, plaintiffs elected to receive VEREP benefits - **to which they had no accrued or vested right**, which no younger employee received, and which indisputably were more valuable than Severance Plan benefits - plus their full vested pension benefits. Plaintiffs **were treated better, not worse,** than younger employees. That is not discrimination. Further, plaintiffs' ADEA claims fail because the **denial** of Severance Plan benefits was based on their **elections to retire** under VEREP and not age. As a matter of law, a decision based on a factor other than age, even if it correlates with age, does not violate ADEA. Because the district court correctly held that plaintiffs **could not establish a prima facie case** under ADEA, **it did not have to reach affirmative defenses** to ADEA liability amended or added by the Older Workers Benefits Protection Act of 1991 ("OWBPA"), 29 U.S.C. §623(f)(2) and (*l*)(2). (emphasis added)

FROM PAGES 39-40:

The dispositive point remains that no plaintiff or **other employee, younger or older**, was required to choose between vested pension benefits and severance pay. Plaintiffs' only choice involved a special, one-time only enhanced benefit program to which plaintiffs had no

pre-existing entitlement and that was unavailable to younger employees. Plaintiffs thus were given the choice to receive everything any younger employee could receive (severance pay and vested pension benefits) or something more (VEREP benefits, including the Service Benefit, plus vested pension benefits). Because plaintiffs were not treated adversely, the district court correctly dismissed their ADEA claims as a mater of law.